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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 660

UNION PRODUCING COMPANY,

Petitioner,

vs.

MRS. MINNIE E. WHITE, JOAB TURNER BROOCKS, MRS. FRANK BROOCKS, AND MRS. WALTER TROUT,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To this Honorable Court:

Your petitioner, Union Producing Company (Appellant in the court below), respectfully presents this petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review the decision and decree made and entered in said Circuit Court of Appeals on the 17th day of September, 1946 (Holmes, Waller and Lee, Circuit Judges, sitting) (Tr. # 2, p. 193).

Petition for rehearing was duly filed and denied by the Court on October 12, 1946 (Tr. # 2, pp. 196, 212).

On application of petitioner, the issuance of the mandate of the Circuit Court of Appeals was stayed for thirty days from October 12, 1946, in order to afford petitioner an opportunity to apply to the Court for a writ of certiorari.

Summary Statement of Matter Involved

This case was originally filed on September 22, 1941, in the District Court of the United States for the Southern District of Mississippi, by Mrs. Minnie E. White, as plaintiff, a respondent here, against defendant, petitioner here, seeking to cancel for fraud, an oil, gas and mineral lease she executed to defendant on July 31, 1939 (Tr. #1, pp. 88-90), covering 4.8 acres undivided in 80 acres in Yazoo County, Mississippi, inherited from her divorced husband, W. H. Adcock, through her daughter (Tr. #1, pp. 2-7). The petition showed Mrs. White in October, 1940, eleven months before suit, sold to Walter Moring for $500.00 cash all her right, title and interest in the land. Petitioner filed motion to dismiss and contested her capacity as plaintiff (Tr. #1, p. 18) to cancel without owning any interest in the lands involved.

Intervening plaintiffs, respondents here, with Mrs. White's consent, came in, adopting her allegations, and setting up a deed from Moring to Stevens dated January 10, 1940, as origin of their title (Tr. #1, pp. 26-32). Petitioner contested their capacity to impeach for fraud allegedly practiced upon their grantor, a fraud action not being assignable (Tr. #1, pp. 36-37).

Petitioner, by permitted amendment, denied jurisdiction (Tr. #1, p. 72), contending, *inter alia,* that plaintiffs were suing Moring in the same court to remove as cloud his claim

that the deed from him to Stevens was a forgery (Tr. #1, pp. 47-68) Moring, by deposition in this cause, testified such deed was a forgery and that he claimed to be sole owner of the interest (Tr. #1, pp. 320-339). Petitioner contended Moring was an indispensable party, hostile to plaintiffs, whose joinder would destroy diversity and thus oust jurisdiction. All such pleas were overruled (Tr. #1, pp. 71-72).

On the merits, defendant denied fraud, and affirmatively pled ratification, waiver, release, estoppel, confirmation, and laches based upon expenditure of $63,960.09 as cost of drilling two wells without notice of claim from plaintiffs (Tr. #1, pp. 18-24, 36-41, 44, 45, 226).

Upon trial, petitioner got an instructed verdict (Tr. #1, pp. 365-366). Plaintiffs appealed to the Circuit Court of Appeals (Sibley, Holmes and Waller, Circuit Judges, sitting), which affirmed jurisdiction, but reversed and remanded for finding on fraud. (January 19, 1944, 140 Fed. 2d 176.) The opinion stated that plaintiffs "introduced ample evidence, if believed, to support a finding of actual fraud" (Tr. #2, p. 6).

Upon remand intervening plaintiffs were permitted to amend, adding the ground of accounting (Tr. #2, pp. 20, 21-22).

Upon re-trial, no new evidence being introduced, the court found fraud (Tr. #2, pp. 23-24). In response to defendant's motion to substitute findings of fact and conclusions of law, the trial court stated that such decision was "required to be made by the mandate of the Circuit Court of Appeals in its decision in this cause" (Tr. #2, p. 50).

Petitioner appealed, contending the decision was not that of the trial judge, but was compelled by the provision quoted above from the first opinion. The Circuit Court of Appeals (Holmes, Waller and Lee, Circuit Judges, sitting) on February 14, 1946 (153 Fed. 2d 856) reversed and re-

manded the cause, holding that it did not mean, by the quoted provision from the first opinion, to foreclose or direct the court's action on the issue of fraud, but intended to leave that issue wholly open; that the first appeal foreclosed all issues, including jurisdiction, raised by petitioner, except whether Moring was an indispensable party to an *accounting* suit (which it denied), and whether there was sufficient evidence under Mississippi law to show fraud (which it reserved pending decision below); and ordered consolidation with the case of *Broocks* v. *Moring* in the court below, being the suit by intervening plaintiffs against Moring in respect of Moring's claim of forgery. One Judge concurred, stating his belief that the evidence was legally insufficient to show fraud, and one Judge dissented (Tr. #2, pp. 76-84).

Plaintiffs, with permission, filed a second petition for rehearing, attaching thereto certified copies of proceedings in the case of *Broocks* v. *Moring*, wherein Moring withdrew his contest of the validity of the deed from Moring to Stevens (which he testified in this cause was a forgery), and confessed judgment in that cause (Tr. # 2, pp. 131-170) which was granted, 156 Fed. 2d 58). On September 17, 1946, the Court affirmed the trial court, cancelling petitioner's lease for fraud and granting a money judgment against defendant, holding that the provision quoted above from the first opinion (140 Fed. 2d 176), which it had held was not designed to constitute decision upon the sufficiency of the evidence (an issue reserved) (153 Fed. 2d 856), now foreclosed the issue, leaving open under Rule 52 (a) of the Rules of Civil Procedure only the question as to whether the trial court abused its authority in accepting credibility of the witnesses. Judge Waller, who filed the concurring opinion above noted (Tr. # 2, pp. 193-195) dissented.

Jurisdiction

This petition for writ of certiorari is prosecuted pursuant to the provisions of Section 240 of the Judicial Code (Title 28, Sec. 347 U. S. Code) and Rule 38 of the Revised Rules of the Supreme Court of the United States, adopted Feb. 13, 1939, and amended March 25, 1940, and Oct. 21, 1940, providing for review on writ of certiorari of decisions of the Circuit Courts of Appeal.

Petitioner further shows that the Circuit Court of Appeals has rendered its decisions herein on important questions of local law in a way which conflict with the applicable local decisions, that is, the decisions of the Supreme Court of the State of Mississippi, which are controlling on the issues; and also has decided a question of general law in conflict with the weight of authority. Section 4 (b) Revised Rules of the Supreme Court, *supra*; *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. Rep. 817, 82 L. Ed. 1188.

Petitioner further contends that the decision of the Circuit Court of Appeals as to capacity of plaintiffs and jurisdiction of the court is violative of the decisions of this court and other Federal courts, including its own, in that capacity of the plaintiffs and jurisdiction of the Court must and can only be determined on the existence of things at the inception of the cause; that the original plaintiff, having no interest whatever in the land at the date of the suit, was without right to maintain a suit to cancel for fraud; that the intervening plaintiffs, exhibiting no prior, independent, equitable right in the premises, cannot, by claimed privity of estate only with the original plaintiff, maintain a suit for fraud allegedly practiced upon her as their mesne grantor; that necessity of Moring's joinder could only be determined upon the cause for cancellation alleged by the original bill, whereby failure to join him, claiming sole ownership, ren-

dered defendant subject in this cause to a decree of cancellation while leaving it bound in Moring's absence upon the contract of the lease to Moring: a result inconsistent with equity or justice. Petitioner further contends that the amendment, after the first appeal, by the intervening plaintiffs, adding a cause for accounting, could not obviate lack of jurisdiction existing on the original bill in respect of a suit to cancel, nor confer jurisdiction, if it did not exist originally. Petitioner further contends that pendency of this cause until intervening plaintiffs were able to effect a composition with Moring was tantamount to permitting the intervening plaintiffs and Moring, by agreement *inter sese*, to confer jurisdiction upon the court, contrary to the rule that jurisdiction cannot be conferred by consent.

Questions Presented

The following are the issues presented by this application:

(1) The Circuit Court of Appeals erred in holding that the original plaintiff, Mrs. White, had capacity to maintain the cause for cancellation of defendant's lease for fraud, because the bill showed that prior to the filing thereof she had conveyed to Moring all of her right, title and interest in the lands involved.

(2) The Circuit Court of Appeals erred in holding that intervening plaintiffs as mesne grantees of Mrs. White could maintain a suit to cancel defendant's lease for fraud allegedly practiced upon Mrs. White because fraud is not a vendible chose, and it is against public policy to permit one to assign a cause of action for fraud or to permit a grantee, not exhibiting a prior, independent, equitable right in the premises, to maintain a cause for fraud.

(3) The Circuit Court of Appeals erred in refusing to follow the decisions of this Court and the weight of authority generally in other Federal Courts, in holding that Walter Moring was not an indispensable party whose joinder would destroy diversity and thus oust jurisdiction, because the uncontradicted record shows that he claimed an interest of such a nature that a final decree in a suit to cancel for fraud could not be made without either affecting his interest or leaving the controversy in such a condition that its final determination would be wholly inconsistent with equity and good conscience.

(4) The Circuit Court of Appeals erred in holding, contrary to the substantive law of Mississippi as laid down by the Supreme Court of Mississippi, by which it is bound and concluded, that the evidence of fraud in this case was either clear and convincing, or met the test of the Mississippi requirements.

(5) The Circuit Court of Appeals erred in holding that Mrs. White and her assigns were not precluded, as a matter of law, even if there were fraud, from any recovery by virtue of her receipt and retention in her possession, her endorsement and cashing of defendant's check, given her on execution of the lease, which showed upon its face that it was the consideration for the execution of the oil, gas and mineral lease involved herein.

(6) The Circuit Court of Appeals erred in holding contrary to the substantive law of Mississippi by which it was bound as laid down by the opinions of the Supreme Court of Mississippi that plaintiffs had not ratified petitioner's lease, or that they were not estopped as a matter of law to assert any claim of invalidity.

(7) The Circuit Court of Appeals erred in holding that the acts of plaintiffs in sitting by, while knowing, and per-

mitting petitioner to risk its money to drill two oil and gas wells and remaining silent until said wells were demonstrated to be good wells, did not, as a matter of law, constitute laches and inequity, barring any rights of plaintiffs for recovery.

Reasons Relied On for the Allowance of the Writ

The following reasons for allowance of the writ apply to each of the seven questions presented above in their order:

(1) The original bill showed that Mrs. White, before suit, had conveyed all of her right, title and interest to one Moring. The Circuit Court of Appeals on both appeals (opinion of January 19, 1944, and February 14, 1946) held that to be the effect of such deed.

It is elementary that a suit must be brought and prosecuted by the real party at interest. Thus, Mrs. White, owning no interest whatever in the lands and premises involved could not maintain a cause for cancellation as for fraud. Rule 17 (a) of the Federal Rules of Civil Procedure, and the rules of decision in many adjudicated cases which will be cited in the brief which follows this application.

(2) The intervening plaintiffs claimed title under Moring, grantee of Mrs. White. It has long been the rule of this Court that a cause of action for fraud is unassignable, because contrary to public policy, and that a subsequent purchaser cannot set up the alleged fraud of the first grantee to defeat his title; so that the holding of the Circuit Court of Appeals that plaintiffs in this case could maintain a suit for cancellation for fraud is directly contrary to the holdings of this Court, and is contrary to the great weight of decisions in many adjudicated cases which will be cited in the brief which will follow this application.

(3) The original petition, claiming fraud on Mrs. White, showed Walter Moring to be the true owner. It rested jurisdiction upon diversity of citizenship. Intervening plaintiffs claimed title by virtue of a deed from Walter Moring to A. L. Stevens, (Mrs Walter Trout in this record). In the same court, Joab Turner Broocks, respondent here, as Trustee for Mrs. Trout and Mrs. Frank Broocks, respondents here, sued Moring to cancel his claim that the alleged deed to Stevens (Trout) was a forgery. Moring testified in this cause, by deposition, that it was a forgery. Petitioner contended that Moring's interest was thus necessarily adverse to the plaintiffs. The Circuit Court of Appeals in its second opinion (February 14, 1946) said that the suit of *Broocks* v. *Moring* showed that intervening plaintiffs had taken the position, at least, that Moring's claim was a cloud upon their title. Moring, asserting sole ownership, was an indispensable party because the court could not proceed to determine the equitable right of cancellation without necessarily adjudicating upon his material claim and interest in his absence. Mrs. Walter Trout and Moring were citizens of Texas. His joinder would destroy diversity and thus oust jurisdiction. The Circuit Court of Appeals in its first opinion (January 19, 1944) in a footnote stated agreement with the ruling that Moring was not an indispensable party to cancellation.

Petitioner contended cancellation would not bind Moring so that if he were adjudged the true owner; defendant would be in the unconscionable position of having the lease cancelled and an adjudicated obligation owing to intervening plaintiffs while bound on the lease contract to Moring, so that not to join Moring and to proceed in his absence was contrary to equity and good conscience. The holding that Moring was not an indispensable party defendant, with

consequent ouster of jurisdiction, is in direct conflict with numerous decisions of this Court, and with decisions of the Fifth Circuit Court of Appeals set forth in the brief following this application.

(4 and 5) The Supreme Court of Mississippi in *Railroad* v. *Turnbull,* 71 Miss. 1029, 16 So. 346, held that evidence to sustain a judgment of fraud must be "clear, convincing and *indubitable*". Petitioner contends that the decision of the Circuit Court of Appeals is contrary to that rule of decision, since the evidence in this case is not, and is not held by that court to be, "indubitable".

In the case of *Trucker's Exchange Bank* v. *Conroy,* 190 Miss. 242, 199 So. 300, the Supreme Court of Mississippi held that where plaintiff does not accurately remember the location on the instrument of matter material to the existence of fraud, there could be no satisfactory proof of fraud, as a matter of law. In this case petitioner contended that Mrs. White's testimony that the signature of her cousin, Mrs. Malone, was immediately under her signature, whereas it was across and on the left hand side of the page (Tr. #1, p. 122-124), together with Mrs. White's testimony that there was no writing in pen and ink on the bottom half of the check at the time she presented it to the bank for cashing (Tr. #1, p. 97-98), whereas the writing on the check with the bank stamp thereon is conclusive proof to the contrary (T. #1, p. 93) are within the express prohibition of this rule of substantative law so that the decision of the Circuit Court of Appeals is in direct conflict therewith.

The Supreme Court of Mississippi, in *Hunt* v. *Sherrill,* 195 Miss. 688, 15 So. 2d, 42, held that if the plaintiff had an *opportunity* to examine, which examination would have disclosed the truth, plaintiff, under such circumstances, was not entitled to recover. Mrs. White admitted that petitioner's agent told her she could read the instrument if

she wanted to but she refused (Tr. #1, p. 85). The decision of the Circuit Court of Appeals is in direct conflict with such holding.

Mrs. White testified that she kept the $5.00 check of petitioner with the writing on the bottom reciting consideration for execution of the lease (Tr. #1, p. 93) from July 31, 1939, until she cashed it at the Bank in Jackson, Mississippi, on August 4, 1939, without looking at it, but denied there was writing on the bottom (Tr. #1, p. 86-87), (Tr. #1, p. 97-98, 134-135, 175). She thus had full and untrammeled opportunity to examine the check which examination would have destroyed any deceit. Petitioner contends the holding here conflicts with the rule in Mississippi that where the means of information are equally accessible to both parties, the one is charged with knowledge thereof, and does not have the right to rely upon the representations of the other. Cases establishing these rules will be cited and discussed in the brief to be attached hereto. Petitioner contends that *Hunt* v. *Sherrill* (1943) 195 Miss. 688, 15 So. 2d. 42, repudiates the holding of the cases cited by the Circuit Court of Appeals in footnote 3 of its first opinion (T. # 2, p. 6).

In *Metropolitan Life Insurance Co.* v. *Hall,* 152 Miss. 413, 118 So. 826, the Supreme Court of Mississippi held that there is a *prima facie* presumption that all persons act honestly so that there is thus a legal presumption against fraud. Petitioner contends that the court below and the Circuit Court of Appeals refused to abide by this rule and to accord same to the defendant.

(6) The deed from Moring to Stevens expressly stipulated the same to be subject to any valid and subsisting oil, gas or mineral lease or leases on the land, and conveyed proportionate parts of royalties and other benefits accrued or to accrue under said leases.

Petitioner contended the lease from Mrs. White to it dated July 31, 1939, being at worst voidable, and the lease from Mrs. J. G. Harris purporting to cover the entire tract out of which comes the lands here involved (Tr. #1, p. 10-17) were each and both of record at the time and were thus expressly within *Cummings* v. *Mid-States Oil Corp.*, 9 So. 2d, 648, in which the Supreme Court of Mississippi held that such provisions and recitals constituted adoption, ratification and confirmation and estopped the parties from asserting any invalidity. Petitioner contends the holding of the Circuit Court of Appeals is in direct conflict with such holding.

(7) The Circuit Court of Appeals held defense of laches would not exist in favor of one charged with a fraud. (First opinion, January 19, 1944) (Tr. #2, p. 7-8). Petitioner contended that defense is available in a case of fraud, and that it is even more rigidly enforced in a case involving minerals because of the nature of minerals, so that time is measured by hours and days rather than by months and years. Thus, such holding violates the rules of decision in many adjudicated cases both from Mississippi and from Federal and other jurisdictions cited in the brief which follows this application.

WHEREFORE, petitioner for the reasons heretofore given and hereafter argued in the brief in support of this petition for review, respectfully prays that this Court issue a writ of certiorari, directed to the United States Circuit Court of Appeals for the Fifth Circuit, requiring said Court to certify and send to this Court a full and complete transcript of the record herein, bearing the Circuit Court of Appeals Docket numbers 10,690 and 11,432 to the end that this case may be reviewed and decided by this Court as provided by law; and that the judgment and decision of

the Circuit Court of Appeals be reversed, with directions to remand the same to the District Court with instructions to dismiss the bill and petition of the plaintiff and intervening plaintiffs with prejudice, or upon such terms as this Court may direct, and that your petitioner have such other and further relief in the premises as to this Court may seem just and proper.

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FIELDING L. WRIGHT,
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BRIEF IN SUPPORT OF FOREGOING PETITION FOR CERTIORARI

The following argument is offered on each of the seven questions presented, as set forth in the foregoing petition, in their order.

1. The Circuit Court of Appeals erred in not holding that the original plaintiff, Mrs. White, was without capacity to maintain the suit, and in not ordering the same dismissed.

The original bill filed by Mrs. White on September 22, 1941, alleged that theretofore, on October 17, 1939, Mrs. White had sold her entire interest to Walter Moring (Tr. #1, pg. 4). The Circuit Court of Appeals in both opinions found that Mrs. White, prior to the institution of suit, had conveyed all of her title to this property.

In *McCalla* v. *Bane* (C. C. D. Or. 1891) 45 Fed. 828, app. dismissed, 12 S. Ct. 984, 145 U. S. 646, 36 L. Ed. 854, plaintiff, who sought cancellation, had conveyed all interest before suit. In an unusually clear statement the Court said:

> "But if the fact were otherwise and these deeds were void, by this conveyance she has divested herself of all interest in the property, and, therefore, cannot maintain this suit. When she commenced her suit, she had no interest in the subject-matter. Argument cannot make this matter plainer than the language of her deed."

Rule 17(a) of the Federal Rules of Civil Procedure requires that all cases shall be prosecuted by the real party in interest. Mrs. White could not be the real party in interest. If she owned no interest in the property, she had no right or power in the property whatever which gave her authority to cancel any instrument affecting the property. In *9 Corpus Juris p. 1224,* it is represented to be the general rule from

the weight of authority everywhere that one without interest in the subject matter is not entitled to rescission or cancellation.

Petitioner contends that Moring, by privity of estate, succeeded to all rights, privileges and estate which Mrs. White had owned in respect of its oil, gas and mineral lease. He, alone, then had the sole right to enforce or contest the propriety of petitioner's performance of such lease contract. It would be an intolerable situation if a person having no connection whatever with the title had authority, upon any ground, to interfere with the continuing existence of contracts or instruments affecting that property.

2. Plaintiffs had no capacity to cancel for fraud allegedly practiced upon their mesne grantor.

The intervening plaintiffs asserted title by virtue of the conveyance from Moring to Stevens (Tr. #1, p. 27, 30-32).

Such deed is dated January 10, 1940, so that the origin of the intervening plaintiffs' title bears date subsequent to the date of the alleged fraud on July 31, 1939. Being intervenors, they had to take the case as they found it, and they recognized it by adopting the allegations of Mrs. White and tendering only the issue of cancellation as for fraud.

It has long been the rule that a cause of action for fraud is unassignable, because contrary to public policy. *Traer* v. *Clews,* 115 U. S. 528, 6 S. Ct. 159, 29 L. Ed. 467; *Graham* v. *LaCrosse,* 102 U. S. 148, 26 L. Ed. 106; *Jones* v. *Comer* (S. Ct. of W. Va.) 13 S. E. 2d, 578; *United Zinc Co.* v. *Hardwood,* 216 Mass. 474, 103 N. E. 1037; *Booth* v. *Green Inv. Co.* (D. C. N. D. Okla. 1934) 7 Fed. 567; *Davis* v. *Robodeaux* (S. Ct. Okla.) 97 Okla. 86, 226 Pac. 990; *Cochran Timber Co.* v. *Fisher* (S. Ct. Mich.), 190 Mich 478, 157 N. W. 282;

Volunteer St. Life Ins. Co. v. *Powell-White Company* (Ga.), 1 S. E. 2d. 662; *Bozeman* v. *Cox*, 66 Ga. 67; *Puffer* v. *Welch* (S. Ct. Wis.), 144 Wis. 506, 129 N. W. 525.

An unusually clear statement of the rule is contained in the case of *Graham* v. *LaCrosse, supra*, wherein Mr. Justice Bradley said:

> "A deed obtained from the grantor, through fraudulent representations made by the grantee, is not void, but voidable only at the election of the grantor, and that the conveyance of the same land by the grantor to another person is not the exercise of such election, and does not avoid the former deed; that in order to avoid such former deed, some proceeding must be had by the grantor to which the grantee is a party; and that a subsequent purchaser from the grantor cannot set up an alleged fraud of the first grantee to defeat his title; the court holding that the right of a vendor to avoid a sale or deed on the ground of fraud practiced by the vendee is not a right or inteerst capable of sale and transfer, so as to enable a subsequent vendee of such right, for such cause, to attack the title of the first vendee; that it is a mere personal right incapable of sale or transfer."

The inception of the rule was that fraud ought not to be a vendible chose since its sale was maintenance that would give rise to immorality, encourage additional fraud, and all of the evils that would consequently follow therefrom. If, however, the grantee had procured a prior independent equitable right, he thus had a vested interest which he was entitled to protect by exposing and destroying the fraud, and thus there was engrafted an exception on the rule. See *Wessenfelds* v. *Cable* (S. Ct. Mo.), 208 No. 515, 106 S. W. 1028; *Graham* v. *LaCross, supra*. Intervening plaintiffs had no prior, independent, equitable right.

The public policy against the assignment of a cause of action for fraud and the maintenance of suit thereon by an

assignee is so strong, and is so obviously in the public interest, it ought not to be subject to avoidance by any device whatever. The Circuit Court of Appeals was in error in holding this suit could be upheld as one to remove cloud or confirm title under Sections 404 or 405 of the Mississippi Code of 1930 (Tr. #2, p. 8, and footnote 12 thereon). Mrs. White, owning no title, could not have had any title upon which to confirm, or against which a cloud could be removed. However the suit might be designated, the inescapable fact remains that the sole purpose of the plea of intervention was to cancel petitioner's oil, gas and mineral lease for a fraud allegedly practiced upon Mrs. White. Petitioner respectfully presents that an examination of the pleadings, the record, and the several opinions of the Circuit Court of Appeals shows unquestionably that the same was treated and disposed of solely as a suit to cancel for fraud.

Petitioner contends that the fact that the plaintiffs were trafficking in the claim and assertion of fraud cannot be gainsaid and that they, having no capacity to maintain such a suit, the same should have been ordered dismissed both by the trial court and the circuit court of appeals.

3. There was no jurisdiction because Moring was an indispensable party whose joinder destroyed diversity and thus jurisdiction.

By Section 80 of 28 U. S. C. A. (Judicial Code, Sec. 37) it is statutorily required that when diversity fails the District Court shall proceed no further, but shall dismiss or remand, if the case was one which had been removed.

Federal Courts are courts of limited jurisdiction, and the presumption at every stage is against jurisdiction, unless the contrary affirmatively appears from the record. *Bors* v. *Preston*, 111 U. S. 252, 4 S. Ct. 407, 28 L. Ed. 419; *Lehigh Mining & Mfg. Co.* v. *Kelly*, 160 U. S. 327, 16 S. Ct. 307, 40 L. Ed. 444.

Both this court, the Circuit Court of Appeals for the Fifth Circuit, and other Federal Courts have held numerous times that persons who have an interest in the controversy of such a nature that a final decree could not be made without either affecting that interest or leaving the controversy in such a condition that its final determination would be wholly inconsistent with equity and good conscience, were indispensable parties who should be brought in unless so to do would destroy jurisdiction, and in that event the cause should be dismissed. The test of indispensability under the decided cases is not whether the decree is bound to affect injuriously the right of the absent party, but it is enough that the absence of such party *may* leave the controversy in such condition that the result would be inconsistent with equity and good conscience. *Shields* v. *Barrow*, 17 How. 130, 15 L. Ed. 158; *Minnesota* v. *Northern Securities Co.*, 22 S. Ct. 308, 184 U. S. 199, 46 L. Ed. 499; *Mallow* v. *Hinde*, 12 Wheat 193, 25 U. S. 193, 6 L. Ed. 599; *Niles-Bement-Pond Co.* v. *Iron Moulders Union*, 254 U. S. 77, 41 S. Ct. 39, 65 L. Ed. 145; *Jose Ribon* v. *C. R. I. & P. Ry. Co.*, 83 U. S. 446, 16 Wall. 446, 21 L. Ed. 367; *Fourth National Bank of N. Y.* v. *The New Orleans & Carrolton Ry. Co.*, 11 Wall. 624, 78 U. S. 624, 20 L. Ed. 823; *Commonwealth Trust Company* v. *Smith*, 45 S. Ct. 26, 266 U. S. 152, 69 L. Ed. 219; *State of California* v. *Southern Pacific Company*, 15 S. Ct. 591, 157 U. S. 229, 39 L. Ed. 683; *Spanner* v. *Brandt* (D. C. S. N. D. Y.) 1 Fed. 555 (demonstrating that the rule of *Shields* v. *Barrow* continues under the Federal Rules of Civil Procedure); *Roos* v. *The Texas Co.* (2 C. C. A.) 23 Fed. 2d, 171; *C. M. & St. P. R. Co.* v. *Adams County* (9 C. C. A.) 72 Fed. 2d, 817; *Trimble* v. *John C. Winston Co.* (5 C. C. A.) 56 Fed. 2d, 150, certiorari denied, 52 S. Ct. 582, 56 U. S. 555, 76 L. Ed. 1289; *Edwards* v. *Glasscock* (5 C. C. A.) 91 Fed. 2d, 562; *Vincent Oil Co.* v. *Gulf Refining Co. of Louisiana* (5 C. C. A.) 195 Fed. 434; *Associated Oil Co.* v. *Miller* (5 C. C. A.) 269

Fed. 16, certiorari denied, 256 U. S. 697, 41 S. Ct. 537, 65 L. Ed. 1176; *Garretson* v. *Nat'l Surety Co.* (5 C. C. A.) 65 Fed. 2d, 874, certiorari denied, 54 S. Ct. 55, 290 U. S. 638, 78 L. Ed. 555.

The Fifth Circuit Court of Appeals in *Town of Lantanna, Florida,* v. *Hopper,* 102 Fed. 2d, 118, held: "if it should have appeared, at any time, after the suit was brought, that plaintiff * * * was not truly a party in interest and was collusively substituted for * * * the real party in interest, there was no diversity of citizenship and it was the duty of the district court to dismiss the case." Petitioner contends the same duty applied here. Mrs. White was not the real party in interest. The intervening plaintiffs claimed to be the real parties in interest, yet the record showed them locked in a death struggle with Moring to determine the real ownership. Mrs. White, after the intervening plaintiffs came in, was a figure-head, but chief witness. They, in truth, prosecuted the suit; their interest was hostile to Moring. There could be no diversity.

It is also well settled law that an amendment stating a cause of action which originally might be within the jurisdiction cannot be filed in order to give jurisdiction where no jurisdiction existed by the original bill. *City of Dawson* v. *Columbia Avenue Savings Funds, etc.,* 197 U. S. 178, 25 S. Ct. 420, 49 L. Ed. 713; *Indianapolis* v. *Chase National Bank,* 314 U. S. 63, 62 S. Ct. 15, 86 L. Ed. 27; *Anderson* v. *Watt,* 138 U. S. 694, 11 S. Ct. 449, 34 L. Ed. 1078.

After the first appeal, the intervening plaintiffs, over objection of petitioner, were permitted to amend their intervening petition by adding a count for an accounting. Petitioner contends they could not thus amend and change the cause of action or the cast of the suit, being bound as interveners by the cast of Mrs. White's original petition never amended, and which sought only to cancel as for fraud;

yet the Circuit Court of Appeals, in its second opinion (153 Fed. 2d, 856) measured jurisdiction by the effect of such amendment, holding Moring was not an indispensable party to a suit for accounting. In the *City of Dawson* case, *supra*, Mr. Justice Holmes, for the Court, said:

> "The attempt, by an afterthought, to give jurisdiction by setting up constitutional rights (by way of amendment) must fail also. The bill presents a naked case of breach of contract."

Paraphrasing that language, if we may, it can be said that

> "The attempt, by an afterthought (on the part of the intervening plaintiffs), to give jurisdiction (where jurisdiction did not exist on the original cause) by setting up (an amendment adding a cause for accounting), must fail also. The bill presents a naked case of suit to cancel for fraud."

In *Anderson* v. *Watt, supra,* the amendment was to allege cancellation of an appointment as executor, which this court held could not be done and thereby exhibit jurisdiction.

Likewise petitioner contends that the continued pendency of this cause until such time as the intervening plaintiffs made a composition of their controversy with Moring (see the opinion granting the second petition for rehearing) (156 Fed. 2d, 58) had effect by the holding of the Circuit Court of Appeals to permit intervening plaintiffs and Moring to confer a jurisdiction upon the trial court and the Circuit Court of Appeals not theretofore existing.

4. The evidence of fraud in this case as a matter of law is insufficient to meet the test of the rule laid down by the Supreme Court of Mississippi, by which the Federal courts are bound.

Petitioner contends that under the rule of *Erie Railway Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188,

the Circuit Court of Appeals and the District Court were bound to follow the law as laid down by applicable decisions of the Supreme Court of Mississippi. The general rule in Mississippi is that fraud must be proven by evidence which is clear and convincing. *Granada Auto Co.* v. *Waldrop,* 188 Miss. 468, 195 So. 491; *Trucker's Exchange Bank* v. *Conroy,* 190 Miss. 242, 199 So. 301; *Metropolitan Life Insurance Co.* v. *Hall,* 152 Miss. 413, 118 So. 826; *Harris* v. *Godbold,* 21 So. 2d, 149; *Railroad* v. *Turnbull,* 71 Miss. 1029, 16 So. 346; *Hunt* v. *Sherrill,* 195 Miss. 688, 15 So. 2d, 426; *Southern Development Co.* v. *Silva,* 125 U. S. 247, 8 S. Ct. 881, 31 L. Ed. 678.

"Clear and convincing" must be more than a "mere preponderance". *Martin* v. *Gill,* 182 Miss. 810, 181 So. 849. In *Railroad* v. *Turnbull, supra,* the Mississippi Supreme Court said that to be clear and convincing evidence must be "indubitable." The Circuit Court of Appeals for the Fifth Circuit in examining the meaning of the requirement under the Mississippi rule in *United States* v. *City of Brookhaven,* 134 Fed. 2d 442, said that to be clear and convincing the proof must be "decisive."

An examination of the letter opinion of the trial court setting forth his decision to find fraud (Tr. #2, p. 23-24) would appear to permit only the conclusion that that court could not and did not consider the evidence clear and convincing, indubitable or decisive; but rather than it was "difficult to determine" that Mrs. White's testimony was tainted with the suspicion of "caution" because of interest; that Gibson, petitioner's agent, was interested to the extent that he was charged with fraud and an employee of petitioner; that Mrs. Malone was the only disinterested witness other than relationship and it would be unreasonable to presume she would perjure herself for benefit of a cousin. Petitioner submits that necessity of such mental peregrina-

tion is incompatible with the certainty of conviction compelled by evidence that is indubitable and decisive.

Analysis of testimony of Mrs. White and Mrs. Malone shows them to be in serious conflict on almost every material matter bearing upon the issue of fraud. Mrs. White's testimony, itself, is full of contradictions, conflicts and impeachment.

In *Trucker's Exchange Bank* v. *Conroy, supra,* a fraud case, the Supreme Court of Mississippi said:

> "One has but to consider the testimony of the appellee to arrive intuitively and confidently at the conclusion that it cannot be safely accepted and acted on, particularly in support of such a grave charge as the one here; for it is manifest therefrom that the *appellee does not accurately remember the contents of the deed* of trust, and was mistaken in thinking she does. For instance, she was evidently mistaken in saying that the jewelry was not listed on the back of the note but was included in the property described in the deed of trust, and had she read the deed of trust as carefully as she now thinks she did, she would have discovered that it covered, as it evidently did, real property which she did not own and which she says she did not intend to include therein. *No verdict based on this evidence should be permitted to stand;* consequently, the court below should have granted the appellant's request for a directed verdict, as to which, *on the evidence there is 'no room for doubt.'* Perry *v.* Clark, 8 How 495, 500, and numerous other cases cited in 14 Mississippi Digest, Trial, Key 139." (Emphasis ours.)

Mrs. White and Mrs. Malone both declared the signature of Mrs. Malone as a witness on the co-lessor's agreement was under Mrs. White's signature on the right hand side of the page, and not on the left hand side of the page, where the instrument showed it to be under Mr. Gibson's signature (Tr. #1, p. 89, 122-124, 96-97, 166, 173-174.)

Again, Mrs. White testified unequivocally and categorically that she did not look at the $5.00 check and did not know what was on it (Tr. #1, p. 86-87, 97, 134-135, 175), yet positively stated there was no writing in pen-and-ink on the bottom half of the check at the time she presented it to the bank for cashing (Tr. #1, p. 97-98). There can be no truth whatever to this statement, and the paper itself is the proof (Tr. #1, p. 93) showing bank stamp when cashed across the writing on the bottom of the check. Petitioner contends that these two matters render testimony completely unacceptable, and are precisely within the prohibition of the case of *Trucker's Exchange* v. *Conroy.*

The Supreme Court of Mississippi in *Hunt* v. *Sherrill,* 195 Miss. 688, 15 So. 2d, 42, held that if plaintiff had *opportunity* to examine, he was charged at law with what such examination would reveal, and where it would reveal the truth, there could be no fraud. That case also decides that "where the means of information are equally accessible to both parties, the purchaser has no right to rely upon representations of the seller." Petitioner contends that the decision here is in direct conflict with *Hunt* v. *Sherrill,* because the Circuit Court of Appeals held that Mrs. White had the right to rely upon the representations allegedly made to her without making any inquiry (Tr. #2, p. 6), although the check and recorded lease giving correct information were within her reach, and because Mrs. White admitted that Mr. Gibson told her that she could read the co-lessor's agreement if she desired and she refused (Tr. #1, p. 85). Having opportunity, she is bound by what an examination would show. The rule of *Hunt* v. *Sherrill* has also been applied in *Pilot Life Ins. Co.* v. *Wade,* 153 Miss. 874, 121 So. 844; *New York Life Ins. Co.* v. *Gill,* 182 Miss. 816, 182 So. 109; *Wood* v. *Carpenter,* 101 U. S. 135, 25 L. Ed. 807. Petitioner says that the check given to Mrs. White with the

reading on the bottom cried out continuously while in her possession as to the falsity of the claimed representation.

Mrs. Malone testified that when Mr. Gibson told Mrs. White he was trying to locate the heirs to a certain piece of "oil land" Mrs. White "Cooled down" (Tr. 1, p. 165, 171). Mrs. White admitted she did not rely on Gibson but relied on her cousin, Mrs. Malone, and signed the co-lessor's agreement because Mrs. Malone told her to (Tr. #1, p. 82). Petitioner contends this admission destroys any possibility of fraud or reliance upon a representation, if made.

Recently, in *Koenig* v. *Calcote,* 25 So. 2d, 763, plaintiff sought to cancel a mineral deed for the fraudulent representation that it was represented to be a lease, whereas in truth it was a fee simple deed, and that plaintiff relied upon the representation and did not read the instrument. That is precisely like Mrs. White's allegation that the lease here was represented to be an affidavit. The Supreme Court of Mississippi in that case held that such allegation must show that the plaintiff was prevented from reading by a fraudulent device and artifice. Petitioner contends that there is neither allegation nor proof in this cause of a fraudulent artifice or device, precenting her from reading.

In the second opinion, the Circuit Court of Appeals (155 Fed. 2d, 856) (Tr. 2, p. 76-83) held that there was undecided in this cause the question of the sufficiency of the evidence to show fraud under the Mississippi rule. This question was reserved for decision, yet in its order and opinion of September 17, 1946, this position was abandoned without decision upon the ground, stated in the first opinion, that there was ample evidence, if believed, to support finding of fraud. The court held the only issue left was whether the trial court was warranted in believing. In the opinion of February 14, 1946, the Circuit Court of Appeals, referring to such statement in the first opinion said: "We did not

intend to indicate or suggest any opinion whatsoever as to whether fraud was or was not present." Again the Court said: "If our statement in the first opinion indicated to the court below that we thought that fraud was present, then this opinion should remove that impression and leave the court free to make findings on the issue of fraud strictly in accord with its own view of the evidence heretofore taken or that evidence supplemented in further trial" (Tr. #2, p. 82). In a specially concurring opinion Waller, C. J., then said:

> "I concur in the reversal and remanding of this case on the grounds stated, but I further believe that the evidence in this case fails to measure up to that clear and convincing standard necessary to establish fraud" (Tr. # 2, p. 82).

Petitioner contends, with respect, that the action of the court in abandoning that position and resting its decision upon a statement which it had just declared was not intended to mean what it now said, is not only extraordinary, but arbitrary. Petitioner was entitled to have the Circuit Court of Appeals measure the evidence against the yardstick of the Supreme Court of Mississippi, by whose decisions it is bound. Petitioner submits that opportunity of the trial judge to judge of credibility under Rule 52(a) of the Rules of Civil Procedure cannot take the place of affirmative evidence required to be clear, convincing, indubitable and decisive. Petitioner calls attention to the fact that Waller, C. J., dissented from the order and opinion of September 17, 1946.

Petitioner submits that the evidence in this case as a matter of law is insufficient to meet the test of the Mississippi rule, and that such insufficiency should be declared and the suit of plaintiffs dismisseed with prejudice.

5. The $5.00 check precluded Mrs. White, as a matter of law, from recovery, since she kept and retained it in her possession for several days, endorsed and cashed it, such check upon its face carrying notice to her, which as a matter of law prevented any deceit.

In the argument and brief under the proposition next preceding this, we have demonstrated the truth of this contention upon which we here rest, except to say that such bonus of $1.00 per acre was the then going price in Mississippi for oil leases.

6. Plaintiffs were estopped to assert any claim of invalidity.

Mrs. White's action with respect to the $5.00 check, petitioner contends, constituted ratification, waiver and confirmation on her part.

Intervening petitioners claimed title under the deed from Walter Moring to A. L. Stevens which contained this paragraph:

> "This conveyance is made subject to any valid and subsisting oil, gas, or mineral lease or leases on said land, including, also, any mineral lease, if any, heretofore made or being contemporaneously made from grantor to grantee; but, for the same consideration hereinabove mentioned, grantor has sold, transferred, assigned, and conveyed, and by these presents does sell, transfer, assign and convey unto grantee, his heirs, successors and assigns, the same undivided interest (as the undivided interest hereinabove conveyed in the oil, gas and other minerals in said land) in all the rights, rentals, royalties and other benefits accruing or to accrue under said lease or leases from the above described land; to have and to hold unto grantee, his heirs, successors and assigns."

The co-lessors agreement from Mrs. White to petitioner was filed for record August 1, 1939 (Tr. #1, p. 91), before execution of the deed from Moring to Stevens (Tr. #1, p. 30). It was constructive notice to plaintiffs. It was constructive notice to Moring, whose deed was dated October 17, 1939 (Tr. #1, p. 9).

Mr. Gibson testified that he had with him at the time he procured the lease from Mrs. White, the lease from Mrs. J. G. Harris (Tr. #1, p. 276, 10-17) which covered the 80 acres out of which the lands involved in this cause come. The Mrs. J. G. Harris lease had been of record since June of 1939 (Tr. #1, p. 10).

It is settled beyond peradventure that such a paragraph in the Moring-Stevens deed as a matter of law constitutes a ratification, adoption, and confirmation of petitioner's lease and estops plaintiffs as a matter of law from denying its valid existence. *Cummings* v. *Midstates Oil Corp.* (Miss. S. Ct.) 9 So. 2d, 648; *Grissom* v. *Anderson* (S. Ct. of Texas) 125 Tex. 26, 79 S. W. 2d, 619; *Humble Oil & Refining Co.* v. *Clark* (S. Ct. of Tex.), 126 Tex. 262, 87 S. W. 2d, 471; *Turner* v. *Hunt* (S. Ct. of Tex.) 131 Tex. 492, 116 S. W. 2d, 575, 587, 588; *Anderson* v. *Pioneer Bldg. & Loan Assn.* (Writ of error refused by Texas S. Ct.) 163 S. W. 2d, 421, 424.

The *Cummings* case, *supra,* passed upon a paragraph identical word for word with the paragraph quoted from the Moring-Stevens deed, and applied the rule. Petitioner contended that its lease was, at worst, voidable, and therefore was good until set aside.

The Circuit Court of Appeals for the Fifth Circuit approved the same rule, in the case of *Meeks* v. *Taylor,* 138 Fed. 2d, 458, certiorari denied, 321 U. S. 773, 64 Sup. Ct. 611, 88 L. Ed. 463, and again in the case of *Kennemer* v.

Bennington, 141 Fed. 2d, 555, certiorari denied, 65 S. Ct. 65, 89 L. Ed. 29. In the *Meeks* case, *supra,* it said:

> "There could be no rents and royalties unless the lease was enforced, and her conveyance of them necessarily meant that she adopted the lease and ratified it * * * a ratification once made may not be revoked."

Petitioner contends that the Circuit Court of Appeals was obligated to apply the same rule here by virtue of the decision of the Mississippi Supreme Court in the *Cummings* case, *supra.*

7. The plaintiffs were guilty of laches barring any right of recovery herein.

Petitioner drilled Well No. 1 at a total cost of $32,751.36, and Well No. 2 at a total cost of $31,208.73 (Tr. #1, p. 226). These wells were actually spudded in on August 27, 1940, and October 2, 1940, and respectively completed September 16, 1940, and October 19, 1940 (Tr. #1, p. 210), which was more than a year before this cause was originally filed (Tr. #1, p. 2-7). Petitioner was in visible possession during the drilling, all plaintiffs knew or were on notice about it, and Walter Trout, the husband of respondent Mrs. Trout, was on and off the premises during the course of drilling, watching it; but none gave notice of any claim to petitioner (Tr. #1, p. 110, 262, 263). So the plaintiffs sat by, permitted petitioner to risk its money and waited more than a year before filing suit in order to determine how valuable the wells were.

Laches applies where it will be practically unjust to give a remedy, either because the applicant has by his conduct done that which might be fairly regarded as a waiver of his remedy, or, by his conduct or neglect has, though

perhaps not waiving that remedy, yet, put the other party in a situation in which it would not be reasonable to place him if the remedy were to be afterward asserted. It is delay that works a disadvantage to another. *Comans* v. *Tapley,* 101 Miss. 224, 57 So. 567; *Vanlindingham* v. *Meridian Creek Drainage District,* 2 So. 2d, 591; Griffith's Mississippi Chancery Practice, Sec. 33. See also *Buckner* v. *Calcote,* 28 Miss. 432, cited with approval by this Court in *Johnston* v. *Standard Mining Co.,* 148 U. S. 360, 13 S. Ct. 585, 37 L. Ed. 480. In the *Johnston* case this Court said actual knowledge was not necessary, but that in weighing laches "the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known to him were such as to put upon a man of ordinary intelligence the duty of inquiry." That duty was said to be all the more "peremptory" because the property was mining property subject to enormous increase in value. See also *Johnson* v. *Atlantic, Gulf and West India Transit Co.,* 156 U. S. 618, 15 S. Ct. 52, 39 L. Ed. 556; *Foster* v. *Mansfied,* 46 U. S. 88, 36 L. Ed. 899; *Winn* v. *Shugart,* 10 C. C. A., 112 Fed. 2d, 617.

In *Ware* v. *Galveston City Co.,* 146 U. S. 102, 13 S. Ct. 33, 36 L. Ed. 904, a case involving fraud, the duty to inquire arose because plaintiff "had *opportunity* to make inquiry of the company". In *Pearsall* v. *Silva,* 149 U. S. 239, 13 S. Ct. 833, 37 L. Ed. 713, a recorded deed was sufficient to produce inquiry. The Circuit Court of Appeals for the Fifth Circuit in the case of *Buchanan* v. *Pitts,* 111 Fed. 2d, 599, in an opinion written for that court by the Judge who presided over this case, *nisi,* held recordation was sufficient. In *Davidson* v. *Gray,* 105 Fed. 2d, 405, it was held that laches was applicable in the case of fraud.

Petitioner therefore contends that the refusal of the Circuit Court of Appeals to apply laches in this case involving

fraud was not only contrary to its own decisions, but expressly contrary to the decisions of this Court and of the Supreme Court of Mississippi, by which it is bound.

The cases dealing with mineral rights announce a rule even more stringent: This Court in the case of *Twin Lick Oil Company* v. *Marbury*, 91 U. S. 592, 22 L. Ed. 328, said:

> "The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil from wells. *Property worth thousands today is worth nothing tomorrow; and that which would today sell for a thousand dollars as its fair value, may, by the natural changes of a week or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit.*
>
> "'While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed on which no outlay is made for improvement, and but little change in value, the class of property here considered, subject to the most rapid, frequent, and violent fluctuations in value of any thing known as property, requires prompt action in all who hold an option, whether they will share its risks, or stand clear of them.'" (Italics ours.)

In *Murphy* v. *Johnston*, Tex. Civ. App. (Writ of error dismissed by the S. Ct. of Tex.), 54 S. W. 2d, 159, it is said:

> "• • • the diligence required is measured by months rather than years, each case depending on its own particular facts and circumstances. (citing cases.)
>
> • • • • • • •

> *"Appellants sat by and permitted the oil companies to expend large sums of money in developing and making the oil and gas property valuable; they therefore come clearly within the rule announced in the case of General Electric Co. v. Yost Electric Co., supra, to the effect that a comparatively short time may constitute laches when the conduct of the slothful is such as to induce others in good faith to expend money and take the risks of the enterprise."* (Italics ours.)

See, also, *General Electric Co.* v. *Yost Electric Co.* (D. C.) 208 F. 718; *Holman* v. *Gulf Refining Company* (5 C. C. A.) (1936) 76 F. 2d, 94; *Heard* v. *Houston Gulf Gas Company* (5 C. C. A.) (1935) 78 F. 2d, 189, certiorari denied, 56 S. Ct. 178, 296 U. S. 643, 80 L. Ed. 457; *Davidson* v. *Grady* (5 C. C. A. 1939), 105 F. 2d, 405, rehearing denied, 106 F. 2d, 272, and cases therein cited; *Minchew* v. *Morris* (1922) (Dallas Court of Civil Appeals) 241 S. W. 215; *Reese* v. *Carey Bros. Oil Company* (1926) (Amarillo) (Writ of error dismissed by the S. Ct. of Tex.) 286 S. W. 307; *Gosnell* v. *Lloyd*, 215 Colo. 244, 10 Pac. 2d, 45; *Gill* v. *Colton* (4 C. C. A. 1926) 12 F. 2d, 531; *Hodgson* v. *Federal Oil & Development Co.*, 285 F. 546; *Scott* v. *Empire Land Co.* (D. C. Fla. 1925) 5 F. 2d, 873; *Johnston* v. *Standard Mining Co.* (1892) 148 U. S. 360, 13 S. Ct. 585, 37 L. Ed. 480; *Gildersleeve* v. *New Mexico Mining Co.*, 161 U. S. 573, 16 S. Ct. 663, 40 L. Ed. 812; *Winn* v. *Shugart* (10 C. C. A. 1940) 112 F. 2d, 617; *Johnson* v. *Atlantic G. & W. I. Transit Co.* (1895) 156 U. S. 618, 15 S. Ct. 520, 39 L. Ed. 556.

Conclusion

WHEREFORE, petitioner respectfully submits that its petition for certiorari should be granted, and that upon con-

sideration of the case the decision of the Circuit Court of Appeals should be reversed and the District Court ordered to dismiss the plaintiffs' cause with prejudice, or that the cause be dismissed for want of jurisdiction.

Respectfully submitted,

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